

## Attachment 3

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FILED  
APR - 6 1998  
RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AT&T COMMUNICATIONS, et al.

No. C96-01691 CRB

Plaintiffs,

ORDER

v.

PACIFIC BELL, et al.

Defendants.

Before the Court are the parties' cross-motions for summary judgment. Plaintiffs, AT&T Communications of California, Inc., MCI Telecommunications Corporation, and Sprint Communications Company L.P., have brought claims alleging breach of contract, breach of the covenant of good faith and fair dealing, misappropriation of trade secrets, and violation of the Telecommunications Act of 1996. In their summary judgment motion, plaintiffs request both injunctive relief and monetary damages for the use of their trade secrets. Defendants, Pacific Bell and related entities, have filed a counter-motion seeking summary adjudication on those same claims insofar as they pertain to the Pacific Bell Awards Program. Having carefully read and considered the papers submitted by the parties, and having heard oral argument on Friday, February 27, 1998, it is hereby ordered that the Court GRANTS plaintiffs' motion and request for injunctive relief as to their claim for misappropriation of trade secrets. Further, the Court finds that Pacific Bell's actions did not constitute breach of contract, breach of the covenant of good faith and fair dealing, or a violation of the Telecommunications Act. Accordingly, it is hereby

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ordered that the Court GRANTS defendants' motion as to these claims and DENIES plaintiffs' corresponding motion. This Court will issue the requested injunctive relief based on the conclusion that the defendants' disclosure of this billing information for marketing purposes constitutes a misappropriation of plaintiffs' trade secrets.

I. Procedural History

This Court has previously issued a preliminary injunction in this action. (Hon. Sandra Brown Armstrong, July 7, 1996). In that order, the Court found that plaintiffs had met their burden for preliminary injunctive relief as to their breach of contract, Telecommunications Act, and misappropriation of trade secrets claim, but denied relief as to their unfair competition claim. As a preliminary action, this Court enjoined defendants from using any billing information in connection with the Pacific Bell Awards program or any similar program and from disclosing such information to any person or entity. (See slip op. at 30.) The Ninth Circuit subsequently affirmed that order. (No. 96-16476 (9th Cir. Mar. 4, 1997)).

Plaintiffs now move for summary adjudication on their Telecommunications Act, breach of contract, breach of the covenant of good faith and fair dealing, and misappropriation of trade secrets claims. They request that the Court issue a permanent injunction barring defendants from using plaintiffs' billing information in any marketing program and award royalties for the use of their trade secrets. Defendants have filed a counter-motion for summary judgment addressing the same claims.

II. Facts

Pacific Bell has entered into separate Billing Agreements with plaintiffs to provide plaintiffs' billing and collection services so that telephone service customers can receive both long distance and local charges in a single bill.<sup>1</sup> This customer billing information includes the date and time of phone calls, the number called, the duration of the call, any special pricing details, and the ultimate cost to the customer. Plaintiffs provide this information to defendants in a unique, electronic database format which allows Pacific Bell computerized access to the formatted information. Pacific Bell receives this information from plaintiffs, processes it, and then places the data on each customer's bill along with all other Pacific Bell charges. The parties have described the sum of all charges reflected on a customer's bill as "Total Billed

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<sup>1</sup> The Parties have agreed that with respect to the matters at issue, there is no substantive difference between the parties' respective Billing Agreements. For the purposes of this order, the Court cites to AT&T's contract with Pacific Bell.

1 Revenue" ("TBR"). The bottom line of each bill reflects the customer's TBR, which is paid in a lump  
2 sum to Pacific Bell.

3 At some point during the provision of this billing service, Pacific Bell decided to capitalize on its  
4 simple access to this valuable information by putting it to good use for themselves. The company began  
5 using the electronic billing information acquired from plaintiffs to target high-use customers for  
6 membership in its Pacific Bell Awards incentive program, a frequent-flyer type promotion. Defendants  
7 targeted potential customers whose monthly bills exceeded \$50 by acquiring this information from the  
8 data sent to them by plaintiffs for billing purposes. Pacific Bell then contacted these valuable, potential  
9 awards program members by direct mail or through customer service contact. Defendants continued to  
10 acquire and utilize this information until the Court entered the July 1996 Order enjoining such action;  
11 plaintiffs allege that they continue to accumulate and distribute the data for possible future use.<sup>2</sup>

12 Although Pacific Bell is presently providing its billing services to plaintiffs, it is also a potential  
13 competitor in the long distance market. The Telecommunications Act of 1996 authorizes the existing  
14 Regional Bell Operating companies, including Pacific Bell, to enter the long distance service market upon  
15 the fulfillment of certain conditions. Plaintiffs argue that access to the computerized billing information  
16 for marketing purposes would provide Pacific Bell with an organized, accessible list of plaintiffs' proven  
17 long distance customers and that this information would comprise an enormous competitive advantage  
18 for defendants.

19 III. Legal Analysis

20 A. Summary Judgment Standard

21 A party is entitled to summary judgment where there are no genuine issues of material fact that  
22 would require a trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). No genuine issue of  
23 material fact exists if the evidence "is of insufficient caliber or quantity to allow a rational finder of fact"  
24 to find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 245 (1986).

25 ///

26  
27 <sup>2</sup> Although Pacific Bell assures the Court that it is in the process of concluding its Awards  
28 program, this fact does not remove the potential competitive advantage which defendants could gain by  
using the billing information for other marketing or strategic planning purposes. Accordingly, the  
necessity for injunctive relief is not mooted by Pacific Bell's decision to discontinue its Awards program.

1     **B. Telecommunications Act**

2             This dispute focusses on section 222 of the Telecommunications Act of 1996, entitled "Privacy  
3 of Customer Information." 47 U.S.C. § 222. Plaintiffs contend that section 222 does not grant Pacific  
4 Bell access to its computerized billing files for marketing purposes. Defendants have adopted the  
5 diametrically opposed position that the section permits Pacific Bell to access the information regardless  
6 of the carrier or database source.

7             1.     **Plaintiffs Need Not Provide Pacific Bell with Access to their Electronic Databases**

8             The parties' arguments addressing the Telecommunications Act focus on their rights and  
9 obligations under section 222. Plaintiffs contend that Pacific Bell's use of the electronic billing data in  
10 its awards programs violates the Telecommunications Act; conversely, Pacific Bell argues that the Act  
11 authorizes their access to the electronic information. Essentially, the parties dispute whether Pacific Bell  
12 may use the electronic billing information as the source of CPNI or if they must access the information  
13 through another, less convenient means.

14             Section 222(a) states that "[e]very telecommunications carrier has a duty to protect the  
15 confidentiality of proprietary information of, and relating to, other telecommunication carriers . . . and  
16 customers." Section 222(c)(2), however, provides that "[a] telecommunications carrier shall disclose  
17 customer proprietary network information, upon affirmative written request by the customer, to any  
18 person designated by the customer." (emphasis added.) Section 222(f)(1)(B) defines customer  
19 proprietary network information ("CPNI") as, among other things, "information contained in the bills  
20 pertaining to telephone exchange service or telephone toll service received by a customer of a carrier."  
21 Accordingly, it is clear that "information contained in the bills" regarding customer, usage, times, etc.  
22 must be disclosed by one telecommunications carrier to another upon "affirmative written request" by  
23 the customer. What is not clear, and what presents the central issue for this analysis, is whether CPNI  
24 includes both the information provided from plaintiffs to Pacific Bell and its electronic database form; or  
25 alternatively, whether in defining CPNI the information may be severed from the computer databases such  
26 that plaintiffs may protect their electronic compilation of the data and release the CPNI in a less  
27 accessible format.

28             Plaintiffs contend that the computerized databases of customer long distance usage information,

1 which it provides to Pacific Bell for billing purposes, is not CPNI. They argue that such information in  
2 that format is proprietary and that the terms of section 222 bar Pacific Bells' use or disclosure of the data  
3 for any non-billing related purpose. Plaintiffs do not maintain that the information contained within the  
4 databases is proprietary, just that they have an interest in the billing information when it is organized into  
5 a database format. Defendants counter that the information is CPNI, and that its format is immaterial.  
6 Defendants argue that plaintiffs have no proprietary interest in the database format and therefore, that  
7 they may utilize the information in the computerized form in which it is received. Defendants request  
8 that, pursuant to section 222(c), plaintiffs allow Pacific Bell to use the billing information in its electronic  
9 form upon receipt of a customer release.

10 In issuing the preliminary injunction, the Court addressed these competing theories. It concluded  
11 that "the fact that the amount of an individual customer's TBR is CPNI does not defeat plaintiffs' claim.  
12 Plaintiffs' databases do not appear on customers' bills, and therefore the databases are not CPNI, even  
13 if some data within those databases is." Slip op. at 11. In other words, the Court found that although  
14 the particular information contained in the database was CPNI, plaintiffs had a protected interest in the  
15 computerized format which contained the information. Consequently, the Act did not authorize Pacific  
16 Bell to access that prepackaged information directly from the databases for marketing purposes.

17 Since the Court's initial order, at least one other district court has addressed this issue. See  
18 AT&T Communications of the Southwest, Inc. v. Southwestern Bell Telephone Company, No A-96-CA-  
19 397 (W.D. Tex. Oct. 4, 1996). That case presented facts nearly identical to the ones at issue here; AT&T  
20 sued to prevent Southwestern Bell from using information it had received for billing purposes for its own  
21 marketing goals. Faced with the same question concerning electronic databases and the definition of  
22 CPNI, the court set forth a position opposite to the one enunciated in this Court's July 1996 order. In  
23 comparing the two cases, the Texas court found that:

24 the construction of CPNI advanced by AT&T and accepted by the court in Pacific Bell [is]  
25 cramped, at best. Section 222(f)(1)(B) states that "information contained in the bills pertaining  
26 to telephone exchange service or telephone toll service" is CPNI. Plaintiff's reading of this  
27 provision would require an intellectual distinction between information contained in the *bills* and  
information contained in the *databases*. To make such a distinction would elevate form over  
substance, quite literally; the form (binary digits versus ink on paper), rather than the substance  
would determine whether that information is CPNI.

28 Slip op. at 6-7. The court there examined the dictionary definition of information and concluded that "to

1 construe Congress's modifying phrase 'contained in the bills' to narrow the definition of 'information'  
2 from its common sense meaning of 'facts, data, knowledge' to a more technical meaning of 'facts, data,  
3 knowledge in the form of the printed word' is to attribute to Congress an intention that can nowhere be  
4 gleaned from the face of the statute." *Id.* at 7. While the court's order in Southwestern Bell is both  
5 detailed and well-reasoned, its analysis does not persuade this Court to reverse its earlier position that  
6 the defendants may not access plaintiffs' databases for marketing purposes.

7 Although these cases involve both a detailed set of facts and a new, complicated statutory scheme,  
8 the ultimate question is a relatively simple one: does the format of CPNI matter for the purposes of  
9 releasing the information upon a customer request? In Southwestern Bell, the Texas court found that  
10 the existence of CPNI is determined not by the form it takes, but strictly by the information contained  
11 therein. Accordingly, that court concluded that the Act does not prohibit a billing agent from using CPNI  
12 in the electronic form in which it is received from AT&T for marketing purposes. This Court, however,  
13 must disagree with that court's conclusion that the form in which CPNI is received is immaterial.<sup>3</sup>

14 Plaintiffs have presented a wealth of information addressing the competitive advantages which  
15 Pacific Bell would gain over other carriers by accessing this information in its electronic form. For  
16 example, because AT&T has already compiled and organized this information for Pacific Bell's billing  
17 purposes, Pacific Bell's computers could easily access this data for marketing use. This would allow  
18 Pacific Bell to identify and target high-value long distance customers quickly, without the requirements  
19 of costly and time-consuming data organization, entry, and analysis. Conversely, any non-billing party  
20 would have to go through a more circuitous process to access the same CPNI. For these carriers,  
21 plaintiffs could respond to a request for CPNI by providing the information in the form and manner of  
22 their choosing. Nothing in the Act prevents plaintiffs from delivering CPNI in a format which would  
23 require the requesting company to compile, organize, and enter the information into a computer itself.  
24 Alternatively, a company could request that the customer send the information to them directly. In either  
25 case, the non-billing carriers would have to request updated information from their customers repeatedly,  
26 while Pacific Bell would be continuously receiving new information in the form of billing data. The time

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27  
28 <sup>3</sup> As discussed in section III.B.2, this Court does share the Southwestern Bell court's view  
that the Telecommunications Act does not authorize the issuance of injunctive relief to prevent parties  
from accessing such information. Slip op. at 13.

1 and cost advantages which electronic transfer present over paper delivery, or even a more cumbersome  
2 electronic system, illustrate why the Regional Bell companies have argued so strenuously for the right  
3 to access plaintiffs' electronic databases directly.

4 Although electronic delivery of CPNI would certainly be more convenient for such parties, it is  
5 not required by the Telecommunications Act. Section 222 of the Act does not mandate the manner in  
6 which a telecommunication carrier must release CPNI upon affirmative written request by the customer.  
7 Instead, it is silent on this issue, concentrating on the need for confidentiality and privacy of customer  
8 information. See 47 U.S.C. §§ 222(a), (b), & (c). Section 222 requires that telecommunication carriers  
9 release CPNI upon a customer request, not that it be released in any particular format. Accordingly, the  
10 means and manner of such a release must lie within the discretion of the party possessing the information.

11 Pacific Bell's argument that it should be allowed to use CPNI in electronic form fundamentally  
12 misperceives the relationship between plaintiffs and defendants. Plaintiffs have contracted with Pacific  
13 Bell to perform a service, namely providing billing services for shared customers; it is this relationship  
14 which the Telecommunication Act addresses. To enable Pacific Bell to fulfill its contractual obligations,  
15 plaintiffs have supplied it with billing information in electronic form. What Pacific Bell fails to consider  
16 when it uses that information for marketing purposes is that plaintiffs have supplied that information in  
17 that electronic format for billing, not marketing purposes. Pacific Bell's attempt to use the data for  
18 another purpose treads on the explicit boundaries of the parties' relationship. Here, Pacific Bell cannot  
19 identify any section of the Act which would provide it with explicit permission to extend its use of the  
20 electronic billing information for other purposes.

21 The Court acknowledges Pacific Bell's assertions concerning the efficiency of electronically  
22 transferring the billing information already in its possession to its marketing department. If plaintiffs were  
23 refusing to provide Pacific Bell with CPNI, section 222 would require that this Court order them to do  
24 so. But that is not the issue in this case. At no point have plaintiffs balked at supplying CPNI to Pacific  
25 Bell or argued that Pacific Bell cannot utilize that information for marketing reasons or, for that matter,  
26 any other purpose. Rather, plaintiffs merely demand that they control the format in which Pacific Bell  
27 receives CPNI, just as they would with any other entity which acquires the right to access that  
28 information. The Court finds that nothing in section 222 of the Telecommunications Act denies that right



1 to plaintiffs.

2                   2.     The Telecommunications Act Does Not Provide a Basis to Enjoin Defendants'  
3                   Actions

4             Plaintiffs' request that this Court enjoin Pacific Bell from using the billing information for any  
5 other purpose because it has violated its duty of confidentiality under section 222(a) of the Act.  
6 Although section 222 does not compel plaintiffs to release the information in any particular format, it  
7 is more uncertain whether the section bars Pacific Bell's marketing use of the electronic billing  
8 information. Having held that plaintiff may refuse to grant Pacific Bell access to the electronic  
9 information for marketing purposes, the Court cannot read into the statute an explicit bar on the use of  
10 such information sufficient to justify the issuance of a permanent injunction. See MAI Systems Corp. v.  
11 Peak Computer, Inc., 991 F.2d 511, 520 (9th Cir. 1993) ("As a general rule, a permanent injunction will  
12 be granted when liability has been established and there is a threat of continuing violations.").

13             As noted, little case law exists interpreting section 222 and no court has examined the  
14 circumstances at issue. Plaintiffs' contend that the language of 222(a) creating "a duty to protect the  
15 confidentiality of proprietary information" is sufficient to justify enjoining Pacific Bell's behavior. While  
16 this responsibility is clearly enunciated in the statute, it does not appear to apply in these particular  
17 circumstances. Section 222, entitled "Privacy of Customer Information," addresses a party's duty of  
18 confidentiality concerning that information. Plaintiffs' electronic databases may contain customer  
19 information, but the databases themselves are not customer information. Just as section 222 does not  
20 compel plaintiffs' to provide CPNI in electronic form, it does not explicitly bar Pacific Bell from  
21 accessing the data as such. Further, the court is reluctant to read such a restriction into a section which  
22 focusses on the privacy of customer information and does not contemplate the means of release of such  
23 data. Section 222 simply does not address this issue. Accordingly, plaintiffs may not use section 222(a)  
24 as the basis for justifying issuance of the permanent injunction.

25                   C.     Breach of the Billing Agreement/Breach of the Covenant of Good Faith and Fair Dealing

26             Having established that section 222 of the Telecommunications Act neither compels plaintiffs to  
27 provide Pacific Bell with electronic access to plaintiffs' billing information nor explicitly bars such access,  
28 the Court turns to an examination of the Billing Agreement between the parties. This contract controls  
the rights and obligations established by Pacific Bell's provision of billing services to the plaintiffs.

1 Plaintiffs contend that Pacific Bell's actions violate both the explicit provisions of the Billing Agreement  
2 as well as the covenant of good faith and fair dealing. Although the language of the Billing Agreement  
3 is instructive for this Court's analysis, it fails to provide the explicit bar necessary to justify the issuance  
4 of a permanent injunction.

5 Plaintiffs point to Exhibit D of the Billing Agreement, entitled "Proprietary Information," as the  
6 basis for their claim that Pacific Bell breached the contract. Several provisions limit the use of proprietary  
7 information to billing purposes. (See Exh. D, sec. 3, ¶ B ("Proprietary Information . . . shall be used for  
8 the purposes stated herein"); Exh. D, sec. 3, ¶ C ("the Receiving Party will neither use or disclose the  
9 Proprietary Information, except as required to fulfill its obligation under this Agreement")). Plaintiffs'  
10 argument that Pacific Bell has explicitly breached the agreement falters, however, upon examination of  
11 the section identifying the information covered by Exhibit D: "[t]he types or categories of information  
12 intended to be covered by and protected under these Paragraphs shall only include information  
13 specifically designated and stamped "Proprietary" and provided by one Party to the other Party  
14 (hereinafter, 'Proprietary Information')." As noted previously, this dispute focusses on Pacific Bell's  
15 access to the electronic version of the information, not their access to the information itself. The parties  
16 agree that the data itself is CPNI, disclosure of which is governed by section 222. The Billing Agreement  
17 explicitly defers to "all applicable statutes . . . concerning the disclosure and use of such information  
18 which by [its] express terms state the requirements applicable to such information." (Exh. D, sec. 6.) As  
19 with section 222, the Billing Agreement does not appear to address the question of Pacific Bell's  
20 electronic access to the data. Instead, it governs the use and disclosure of the information itself; as with  
21 section 222, the Billing Agreement does not explicitly prohibit Pacific Bell from accessing the information  
22 electronically. Accordingly, Pacific Bell has not breached the express terms of the Billing Agreement and  
23 the court cannot issue a permanent injunction on this basis. Plaintiffs' claim for breach of the covenant  
24 of good faith and fair dealing is also based on the terms of the Billing Agreement and the Court rejects  
25 that claim for the same reasons.

26 Although no explicit breach exists, the aforementioned sections provide guidance as to the  
27 relationship between the parties. An examination of Exhibit D reveals that plaintiffs' intent was to  
28 provide Pacific Bell with the billing information in an electronic format strictly for the provision of billing

1 services by Pacific Bell. (See Exh. D, sec. 3.) The fact that defendants used that information for  
2 marketing purposes certainly violates the spirit of the agreement; their ability to elude violating the letter  
3 of the Billing Agreement stems from their good fortune that the contract defines "Proprietary  
4 Information" in such a narrow manner.

5 D. Misappropriation of Trade Secrets.

6 Finally, plaintiffs argue that Pacific Bell's actions violate the Uniform Trade Secrets Act  
7 ("UTSA"). Cal. Civ. Code §§ 3426-3426.10. "To establish a violation under the UTSA, it must be  
8 shown that a defendant has been unjustly enriched by the improper appropriation, use or disclosure of  
9 a 'trade secret.'" MAI Systems, 991 F.2d at 520. Pacific Bell argues that the billing information  
10 contained in the electronic databases is not a trade secret because it is CPNI which is proprietary to  
11 telephone customers. See 47 U.S.C. § 222(f)(1). This contention misperceives the central issue:  
12 whether the computerized format of the information, not the information itself, may be protected as a  
13 trade secret. The Court finds that the database is a trade secret under the UTSA and that defendants have  
14 misappropriated that format in violation of the statute.

15 The UTSA defines a "trade secret" as:

16 information, including a formula, pattern, compilation, program, device, method, technique, or  
17 process that:

- 18 (1) Derives independent economic value, actual or potential, from not being generally known to  
the public or to other persons who can obtain economic value from its disclosure or use; and  
(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

19 Cal. Civ. Code § 3426.1(d). Plaintiffs contend that the format of the computerized billing files is valuable  
20 because it constitutes the easiest to use, most accurate, and most complete compilation of CPNI.  
21 Consequently, they argue that the electronic format must be protected as a trade secret.

22 The Court agrees with plaintiffs' contention. As noted previously, the electronic databases are  
23 valuable because they are easily accessible. Plaintiffs have electronically compiled the data to enable  
24 Pacific Bell to provide billing services in an efficient manner; it is this valuable compilation of information  
25 which has attracted the attention of Pacific Bell's marketing department. See Morlife, Inc. v. Perry, 56  
26 Cal. App. 4th 1514, 1521-22 (1997) (holding that in assessing the value of a customer list "the more  
27 difficult information is to obtain, and the more time and resources expended . . . the more likely a court  
28 will find such information constitutes a trade secret"). Pacific Bell does not dispute that electronic

1 organization and accessibility of the information imbues those databases with considerable value. In  
2 addition, that plaintiffs have released these databases for a specific purpose does not remove this value  
3 nor destroy the secrecy required under the statute. See Mettler-Toledo, Inc. v. Acker, 908 F. Supp. 240,  
4 247 (M.D. Pa. 1995) ("The fact that individual pieces of the information claimed to be confidential are  
5 available to the general public does not defeat a claim of confidentiality if the value of the information  
6 stems from its compilation or collection in a single place or in a particular form which is of value.").  
7 Although defendants argue that section 222 of the Telecommunications Act authorizes their access to  
8 the electronic information, the Court has already rejected that contention. Thus, the billing information's  
9 electronic format is a "trade secret" for the purposes of the UTSA.

10 There is little question as to the disclosure of the electronic billing information. Pacific Bell  
11 concedes that it has released plaintiffs' billing information to its marketing department for use in the  
12 Awards program. Accordingly, plaintiffs have established the element of disclosure.

13 Finally, plaintiffs' must establish that Pacific Bell had an obligation not to use or disclose the  
14 electronic billing information to another and thus, that it misappropriated the information.  
15 "Misappropriation" is defined in part under the UTSA as:

16 (2) Disclosure or use of a trade secret of another without express or implied consent by a person  
17 who:

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18 (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of  
19 the trade secret was: (i) Derived from or through a person who had utilized improper means to  
20 acquire it; (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit  
21 its use; or (iii) Derived from or through a person who owed a duty to the person seeking relief  
22 to maintain its secrecy or limit its use.

23 Cal. Civ. Code § 3426.1(b). Although California courts have not explicitly examined the issue presented  
24 here, the courts have consistently found that misappropriation occurs in an analogous situation where a  
25 former employee solicits business by using their former employer's customer lists. See e.g., Morlife, Inc.  
26 v. Perry, 56 Cal. App. 4th 1514, 1524-28 (1997); American Credit Indemnity Co. v. Sacks, 213 Cal. App.  
27 3d 622, 632 (1989).

28 Although these customer list cases are factually distinguishable from the present circumstances,  
the courts' holdings provide firm support for plaintiffs' position that Pacific Bell misappropriated their  
trade secrets. The deciding factor in Morlife and Sacks was that the employees utilized the employer's  
trade secrets (the customer lists) to solicit business and compete with their former employers. See

1 Morlife, 56 Cal App. 4th at 1525; Sacks, 213 Cal. App. 3d at 636. Defendants' actions here are no  
2 different; Pacific has appropriated plaintiffs' valuable information to target plaintiffs' customers. By using  
3 the electronic billing information in a potentially competitive manner, defendants have misappropriated  
4 plaintiffs' trade secrets. This use of the information to electronically identify and target plaintiffs' high-  
5 billing customers is solicitation in its own right. It makes no difference that Pacific Bell could acquire  
6 this information from a different source because the electronic formatting of the database has intrinsic  
7 value. As the Court noted earlier, plaintiffs' billing information is more valuable in a database format than  
8 it would be as a paper copy. The defendants are using plaintiffs' electronically compiled information to  
9 quickly identify plaintiffs' customers as potential Pacific Bell customers and they are doing so with an  
10 ease made possible only by their access to the electronic databases. Because the UTSA protects this  
11 valuable formatting of the information, defendants' have violated the statute by using it for marketing  
12 purposes. See Mettler-Toledo, 908 F. Supp. at 247 (holding that compilation of information alone can  
13 be protected under the UTSA). Accordingly, the Court grants plaintiffs' summary judgment motion on  
14 this claim.

15 4. Terms of the Permanent Injunction

16 The decision whether to grant injunctive relief lies within the equitable power of the trial judge  
17 if plaintiff prevails on its claims and there is no adequate legal remedy. See Koniag, Inc. v. Kocor Forest  
18 Resource, 39 F.3d 991, 1000 n.9 (9th Cir. 1994) (for injunctive relief "it is sufficient that a plaintiff show  
19 that it has no adequate legal remedy"). Here, plaintiffs have prevailed on their summary adjudication  
20 claim under the Uniform Trade Secrets Act and seek to prevent defendants from further accessing any  
21 billing information for non-billing purposes. As no adequate legal remedy exists to bar defendants'  
22 conduct, the Court finds that an injunction against further use of the billing information for purposes  
23 other than billing and collection is the appropriate remedy for this violation.

24 For the foregoing reasons,

25 IT IS HEREBY ORDERED THAT plaintiffs' motion for a permanent injunction is GRANTED.

26 IT IS FURTHER ORDERED THAT defendants, and each of them, and their agents, servants, and  
27 employees and all persons acting under, in concert with, or for them are hereby permanently restrained  
28 and enjoined from:

1. Using any Billing Information for any purposes other than performing billing and collection services on behalf of plaintiffs. This prohibition includes without limitation,

a. using any Billing Information with the Pacific Bell Awards Program or any similar program;

b. using any Billing Information to promote or offer any product, service, or program offered by the defendants or any affiliated entity, or to provide different levels of service to customers; and,

c. compiling Billing Information in any file, database or program.

2. Disclosing to any person, entity (including without limitation any affiliated entities, agents or Awards partners), or computer program any Billing Information, unless it is for the purpose of performing billing and collection services on behalf of plaintiffs. This prohibition includes without limitation,

a. disclosing to Data Services (including any computer program within Data Services) or any other employee, work group, district, division, or entity outside Pacific Bell's billing system, any file that contains Billing Information.


**B. Royalties Claim**

Plaintiffs request royalties for Pacific Bell's use of their trade secrets. They have, however, presented insufficient evidence to justify and calculate such an award. Accordingly, that request is DENIED without prejudice. Parties are directed to attend a case management conference on Friday, April 24, 1998 at 8:30 a.m., Courtroom 8, 19th Floor, to discuss the status of the remaining claims. A joint case management shall be filed no later than 7 calendar days prior to the date of the hearing.

**IT IS SO ORDERED.**

Dated:

4-6-98

  
CHARLES R. BREYER  
UNITED STATES DISTRICT JUDGE

## Attachment 4

## PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298



September 27, 2002

TO: PARTIES OF RECORD IN CASE 02-01-007, INVESTIGATION 02-01-024

This proceeding was filed on January 7, 2002, and is assigned to Commissioner Carl Wood and Administrative Law Judge (ALJ) James C. McVicar. This is the decision of the Presiding Officer, ALJ McVicar.

Any party to this adjudicatory proceeding may file and serve an Appeal of the Presiding Officer's Decision within 30 days of the date of issuance (i.e., the date of mailing) of this decision. In addition, any Commissioner may request review of the Presiding Officer's Decision by filing and serving a Request for Review within 30 days of the date of issuance.

Appeals and Requests for Review must set forth specifically the grounds on which the appellant or requestor believes the Presiding Officer's Decision to be unlawful or erroneous. The purpose of an Appeal or Request for Review is to alert the Commission to a potential error, so that the error may be corrected expeditiously by the Commission. Vague assertions as to the record or the law, without citation, may be accorded little weight.

Appeals and Requests for Review must be served on all parties and accompanied by a certificate of service. Any party may file and serve a Response to an Appeal or Request for Review no later than 15 days after the date the Appeal or Request for Review was filed. In cases of multiple Appeals or Requests for Review, the Response may be to all such filings and may be filed 15 days after the last such Appeal or Request for Review was filed. Replies to Responses are not permitted. (See, generally, Rule 8.2 of the Commission's Rules of Practice and Procedure.)

If no Appeal or Request for Review is filed within 30 days of the date of issuance of the Presiding Officer's Decision, the decision shall become the decision of the Commission. In this event, the Commission will designate a decision number and advise the parties by letter that the Presiding Officer's Decision has become the Commission's decision.

/s/ CAROL A. BROWN  
Carol A. Brown, Interim Chief  
Administrative Law Judge

CAB:tcg



C.02-01-007, I.02-01-024 ALJ/POD-JCM/tcg

Attachment

**PRESIDING OFFICER'S DECISION (Mailed 9/27/2002)**

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

The Utility Consumers' Action Network (UCAN),

Complainant,

vs.

Pacific Bell Telephone Company,

Defendant.

Case 02-01-007  
(Filed January 7, 2002)

Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of Pacific Bell Telephone Company (U 1001 C), Pacific Bell Internet Services, and SBC Advanced Solutions, Inc. (U 6346 C) to Determine Whether They Have Violated the Laws, Rules and Regulations Governing the Inclusion of Charges for Products or Services on Telephone Bills.

Investigation 02-01-024  
(Filed January 23, 2002)

Michael Shames, Lee Biddle, Alan Mansfield and Hallen D. Rosner, Attorneys at Law, for The Utility Consumers' Action Network, complainant.

Garrett Wong, James B. Young, and Ed Kolto, Attorneys at Law, and Cynthia Wales for Pacific Bell Telephone Company, defendant and respondent.

William H. Booth and Merrie M. Cavanaugh, Attorneys at Law, for SBC Advanced Solutions, Inc., respondent.

Keith Epstein, Marilyn Salmon, Steven D. Rathfon, and  
Merrie M. Cavanaugh, Attorneys at Law, for Pacific  
Bell Internet Services, respondent.

James Anthony, Attorney at Law, for The Utility  
Reform Network, interested party.

Travis T. Foss and Laura Tudisco, Attorneys at Law,  
for Consumer Services Division.

## **OPINION ADOPTING SETTLEMENT**

### **Summary**

Pacific Bell Telephone Company (Pacific Bell), Pacific Bell Internet Services, (PBI), SBC Advanced Solutions, Inc. (ASI), Utility Consumers' Action Network (UCAN) and the Commission's Consumer Services Division (CSD) have jointly proffered an uncontested settlement agreement in this consolidated complaint and investigation proceeding involving the companies' billing for DSL services.<sup>1</sup> Under the settlement agreement, Pacific Bell, PBI, and ASI (jointly, Respondents) acknowledge their billing problems and reporting deficiencies, and agree to pay a \$27,000,000 penalty to the State General Fund. The settlement describes the many measures Respondents have taken and will take to correct their problems and ensure that they do not recur. The Commission adopts the settlement, the full text of which is set forth in Appendix A, as resolving all issues in the complaint and investigation, and closes the proceeding.

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<sup>1</sup> DSL is an acronym for asymmetrical Digital Subscriber Line service, one of the underlying technologies for high speed Internet access and broadband service.

## **Background**

### **The Respondents**

Pacific Bell, a California corporation, is a subsidiary of SBC Communications Inc. Pacific Bell is California's largest local exchange carrier. PBI, also a California corporation, is a subsidiary of Pacific Bell and an Internet service provider (ISP) with no Commission operating authority.<sup>2</sup> ASI, a Delaware corporation and subsidiary of SBC Communications Inc., is a Commission-certificated competitive local exchange carrier in California and operates in the entire thirteen-state SBC region. ASI states that its principal product in California today is wholesale DSL transport service sold to ISPs for use in high speed Internet access arrangements.

Pacific Bell began offering DSL transport to business customers in 1998 and to residential customers in 1999, both for use with their chosen ISPs. At the same time, it also sold directly to ISPs at volume prices. In February 2000, PBI began offering consumers a bundled ISP package of DSL transport, which it purchased from Pacific Bell, and Internet access. PBI used Pacific Bell's billing and collection service and customers saw a single price for the bundled package on the PBI page of their Pacific Bell bills. In May 2000, Pacific Bell transferred its DSL transport responsibilities to ASI (referred to as "the SBC-ASI conversion"), reportedly as a result of conditions imposed by the Federal Communications Commission in the SBC and Ameritech merger proceeding. Thereafter, ASI initially provided DSL transport to both end-user customers and ISPs, including PBI. Pacific Bell continued to provide billing and collection services to both PBI and ASI. In some cases ASI's transport services and PBI's Internet services

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<sup>2</sup> PBI also does business as SBC Internet Services.

appeared on users' bills split onto separate ASI and PBI pages, and in others ASI billed its transport to the ISP. Where that ISP was PBI, PBI in turn billed the end-user through its page on Pacific Bell's bills. By the end of 2001, ASI had moved to a purely wholesale model and today no longer bills DSL transport to end-users.

### **The Issues**

On January 7, 2002, UCAN filed complaint Case (C.) 02-01-007 against Pacific Bell setting forth various allegations concerning Pacific Bell's billing, customer service, disconnection and marketing practices, and tariff inadequacies, all relating to Pacific Bell's DSL service.

On January 23, 2002, the Commission issued Order Instituting Investigation (I.) 02-01-024 into, among other things, various DSL and Internet service billing and customer service-related practices by Respondents Pacific Bell and its affiliates, PBI and ASI. The investigation was to afford CSD a forum to advance its evidence of violations of the law and Commission orders, and for Pacific Bell, PBI and ASI to respond.

UCAN's complaint and the Commission's investigatory order set forth some allegations that overlapped and some that were unique. The Assigned Commissioner's Scoping Ruling summarized the resulting issues:<sup>3</sup>

1. Did any or all of the Respondents violate Section 2890 by placing charges on a subscriber's telephone bill for products or services the purchase of which the subscriber did not authorize?

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<sup>3</sup> The section citations here and elsewhere in today's decision area to the Public Utilities Code unless otherwise noted.

2. Did Pacific Bell violate Ordering Paragraph 2 of Decision (D.) 00-03-020 as modified by D.00-11-015, which requires billing telephone companies to maintain accurate and up-to-date records of all customer complaints made to or received by them for charges for products or services provided by a third party, including corporate affiliates?
3. Did Pacific Bell violate Ordering Paragraph 2 of D.00-03-020 as modified by D.00-11-015, which requires billing telephone companies to create a calendar month summary report of all customer complaints received each month for each service provider and billing agent for charges by a third party, including corporate affiliates, and provide it to the Director of Consumer Services Division quarterly?
4. Did Pacific Bell violate Section 702 by violating Ordering Paragraph 2 of D.00-03-020 as modified by D.00-11-015?
5. Did Pacific Bell violate Section 2890 or D.00-03-020 as modified by D.00-11-015 by threatening customers with disconnection or toll restriction due to unpaid DSL charges?
6. Did Pacific Bell violate D.00-03-020 as modified by D.00-11-015 by failing to timely file and serve advice letters to conform its tariffs to the portions of those orders eliminating its authority to disconnect local service for nonpayment of interexchange service?
7. Should Pacific Bell and/or ASI be ordered to pay reparations pursuant to Section 734?
8. Should any or all of the Respondents be fined pursuant to Sections 2107 and 2108, or punished for contempt pursuant to Section 2113, for violations of the Public Utilities Code or any order, decision, rule, direction, demand or requirement of the Commission?

### **Procedural History**

Both the complaint and the investigation were preliminarily designated as adjudicatory proceedings expected to require hearing. Assigned Administrative

Law Judge (ALJ) McVicar consolidated the two proceedings by a ruling issued on February 8, 2002, and Assigned Commissioner Wood and ALJ McVicar conducted a prehearing conference on February 19, 2002.

The scope of the proceeding was as established in I.02-01-024, Ordering Paragraph 1, and C.02-01-007. The Assigned Commissioner's scoping ruling defined the issues as set forth above and designated the ALJ as the presiding officer.

On April 8, 2002, in response to a UCAN notice of intent, the ALJ issued a ruling finding UCAN eligible to claim intervenor compensation under Section 1801 et seq.

In preparation for evidentiary hearings, CSD and UCAN submitted extensive prepared testimony, including dozens of declarations from California consumers who had made complaints alleging DSL Internet service-related billing errors, an analysis of hundreds of DSL billing-related consumer complaints to the Commission's Consumer Affairs Branch, and analyses of many thousands of like complaints to Respondents' organizations. Respondents provided prepared testimony from eight individuals familiar with the company organizations and practices that played a role in their DSL billing problems.

The week before evidentiary hearings were scheduled to begin, the settling parties contacted the ALJ to report that they were engaged in negotiations that they believed could successfully resolve all issues. The ALJ agreed to adjourn the first week of hearings on a day-to-day basis to allow them to continue their negotiations, subject to beginning evidentiary hearings immediately if and when any party reported that they were no longer making satisfactory progress. At the last day of evidentiary hearing on July 3<sup>rd</sup>, the parties answered questions from the ALJ on the latest, nearly-final version of the settlement. They executed the

final settlement agreement and filed it with an accompanying motion later that afternoon.

Under Rule 51.1(b), prior to signing any settlement, the settling parties must convene at least one conference with notice and opportunity to participate provided to all parties. They did so in this case. The Utility Reform Network (TURN), the only party not signing the settlement, was not active in the proceeding and has informed the other parties and the ALJ that it neither supports nor opposes the settlement.

## **The Settlement**

### **Settlement Overview**

The settlement is attached as Appendix A to this decision. In Section 1, Joint Statement of the Case, the settling parties provide a 69-paragraph summary of the problems that led to this proceeding, what caused those problems, how Pacific Bell, PBI and ASI responded, and what corrective actions have been and will be taken. Those explanations need not be repeated here. Subsequent settlement sections describe more specifically the settling parties' intended remedies. Section 2 calls for: credits for the next two years of either \$25 or one month of DSL service for customers who experience future DSL billing errors, as specified, double those amounts when the problem is not timely corrected, and customer recourse to the Commission's expedited complaint process for resolving related disputes; a tracking and reporting requirement; applicability to all residential and up to 20-line business customers; and a 60-day implementation timeframe and two-year sunset provision. Section 3 describes operational improvements including: Pacific Bell business and residential DSL Internet billing centers dedicated to handling billing inquiries for PBI's DSL



Internet services<sup>4</sup>; improved disconnection notices; upgraded DSL order-confirmation, billing, collection, problem resolution, and customer complaint recording and reporting procedures; and restrictions for two years on using coupon rebates and gift or debit cards as DSL promotional offerings. In Section 4, PBI agrees to maintain its billing and collection agreement with Pacific Bell until at least July 1, 2004, thus preserving for at least that period the billing and collection-related improvements in the settlement.

In settlement Section 5, Respondents agree to pay \$27,000,000 into the State General Fund within 30 days after the Commission's approval of the settlement agreement.

### **Specific Issues**

#### **Wrongful DSL Billing Practices**

In settlement Section 1, the parties have agreed to a statement regarding complaints: "During the period of January 2000 through the present, an estimated 30,000 to 70,000 Respondents' customers complained about and/or experienced billing errors." They go on to characterize "certain of these complaints" as falling into five categories that generally parallel wrongful billing practices set forth in I.02-01-024 and which constitute violations of Section 2890(a).<sup>5</sup>

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<sup>4</sup> While Section 3 does not say so, another section of the settlement and the accompanying motion make it clear that these DSL Internet billing centers *will not sell products and services*. See, e.g., settlement paragraph 47 and pages 6 and 11 of the motion.

<sup>5</sup> § 2890(a): "A telephone bill may only contain charges for products or services, the purchase of which the subscriber has authorized."

In addition, Respondents acknowledge in this same settlement Section 1 that certain of those complaints fall into a sixth category: "[B]illing errors were not resolved in a timely manner and/or required multiple calls and substantial investment of time to resolve." Further confirmation of the problem is provided in settlement Section 1, paragraph 11: "[C]ertain customers experienced... unresponsive service, such as long waiting queues, delays on hold, transfers to other departments, unreturned calls, full voice mail boxes, [and] inability to resolve the problem without having to wait on the phone." This is also one of the allegations in UCAN's complaint, and constitutes violation of Section 2890(d)(2)(D).<sup>6</sup>

#### **Disconnection and Toll Restriction**

UCAN alleged that Pacific Bell improperly threatened local service disconnection or toll restriction for disputed DSL Internet service charges in violation of Section 2890(c)<sup>7</sup> and D.00-03-020 as modified by D.00-11-015.<sup>8</sup> UCAN

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<sup>6</sup> § 2890(d)(2)(D): "Any person, corporation, or billing agent that charges subscribers for products or services on a telephone bill shall... provide a means for expeditiously resolving subscriber disputes over charges for a product or service, the purchase of which was not authorized by the subscriber...."

<sup>7</sup> § 2890(c): "The Commission may only permit a subscriber's local telephone service to be disconnected for nonpayment of charges relating to the subscriber's local exchange telephone service, long distance telephone service within a local access and transport area (intraLATA), long distance telephone service between local access and transport areas (interLATA), and international telephone service."

<sup>8</sup> D.00-03-020/D.00-11-015, Ordering Paragraph 4: "Carriers of Last Resort, as defined in D.96-10-066, shall file and serve advice letters that contain revised tariffs no later than 180 days after the effective date of this order that conform to the portions of this order eliminating such carriers' authority to disconnect basic residential and single line business, Flat Rate and/or Measured Rate service, as defined in D.96-10-066, Appendix B, page 5, for nonpayment of any charge other than nonpayment of non-recurring and recurring charges for basic residential and single line business, Flat Rate and Measured

*Footnote continued on next page*

further alleged that Pacific Bell failed to update its tariffs to reflect the Commission's revised disconnection policies, in violation of D.00-03-020. These were issues #5 and #6 in the Assigned Commissioner's Scoping Ruling above.

Respondents' confirmation that there was a toll restriction and disconnect notice problem is provided in settlement Section 1, paragraph 11: "[C]ertain customers experienced the following: inappropriate application of toll restriction for outstanding DSL-related charges; [and] disconnect notices were sent to customers that might have led them to believe that their basic service would be disconnected for non-payment of DSL Internet charges or that a security deposit was required." That Respondents acknowledge the problem is further confirmed by the accompanying motion, at pages 5 and 6.

The same cannot be said about UCAN's allegation (which was not also an I.02-01-024 allegation) that Pacific Bell failed to update its tariffs with regard to disconnection practices, since neither the settlement nor the accompanying motion make mention of it. Additionally, UCAN did not prepare direct or rebuttal testimony pressing this issue, nor did any other party's prepared testimony mention it. With neither factual information in the proceeding record to rely on nor further mention of a problem in the settlement, we see no need to pursue the tariff-filing allegation.

The Commission at one time did have a policy of permitting carriers to disconnect local exchange service for non-payment of certain other, non-local exchange services. That changed with Section 2890(c) and D.00-03-020 as modified by D.00-11-015:

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Rate service, including mandated surcharges and taxes calculated on same. Mandated charges do not include charges that are elective for the carrier to recover. Pending such advice letter filings, current tariffs shall remain in effect."

For these reasons, we intend to limit disconnection of basic residential and single line business service (i.e., Flat Rate and/or Measured Rate services) to nonpayment of non-recurring and recurring charges for basic residential and single line business services, including all mandated surcharges and taxes.

While those two decisions were clear in stating the new policy, they did not immediately forbid the former practice; nor is whatever was formerly an acceptable practice defined in the record of this proceeding. Rather, they gave carriers of last resort 180 days to file advice letters with new, conforming tariff provisions. Since there is no reference in the record of this proceeding to any resulting Pacific Bell advice letter or tariff, we decline to conclude that there was a specific Public Utilities Code, Commission order, or tariff violation associated with issues #5 and #6 of the Assigned Commissioner's Scoping Ruling. What we do know is that the settling parties have agreed that there was a toll restriction and disconnect notice problem, as evidenced by their settlement Section 1, paragraph 11, statement quoted above, and that the measures set forth in the settlement are intended to remedy it.

#### **Recordkeeping and Reporting**

In D.00-03-020, Ordering Paragraph 2, we adopted a set of Subscriber Complaint Reporting Rules. In I.02-01-024, Ordering Paragraph 1(b), we sought to determine whether Pacific Bell as a billing telephone company violated D.00-03-020 by failing to maintain accurate and up-to-date records of all customer complaints made to or received by it for charges for products or services provided by a third party, including corporate affiliates, as those rules require. In Ordering Paragraph 1(c), we sought to determine whether Pacific Bell violated those decisions by failing to create a calendar month summary report of all customer complaints received each month for each service provider and

billing agent for charges by a third party, including corporate affiliates, and to provide it to the Director of CSD quarterly. A public utility's failure to comply with a Commission order or rule may constitute a violation of Section 702,<sup>9</sup> a possibility raised in Ordering Paragraph 1(d).

In settlement Section 1, paragraphs 30 through 44 set forth the parties' statement of facts which constitute Respondents' admission that they did not always maintain the records and submit accurate reports as D.00-03-020 and D.00-11-015 require. This is summarized in the settlement's page 1 Joint Statement of the Case as, "Respondents acknowledge to the Commission that certain billing errors and reporting deficiencies occurred that were unacceptable and should not have happened." Further confirmation is provided in the accompanying motion, which states that the settlement's new tracking and reporting requirements are for Pacific Bell's "failure to report to CSD all complaints against its affiliates SBC-ASI and PBI..." and, "This action is expected to eliminate future violations of D.00-03-020 as alleged by CSD in the OII."

We conclude that Pacific Bell did violate Ordering Paragraph 2 of D.00-03-020 as modified by D.00-11-015, and thus Section 702.

Further, we note that, although settlement Section 2.5 calls for additional customer complaint tracking and reporting, nothing in the settlement relieves Pacific Bell as a billing telephone company of its responsibility to comply

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<sup>9</sup> § 702: "Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees."

with the tracking and reporting requirement we established in Ordering Paragraph 2 of D.00-03-020 as modified by D.00-11-015. These are different requirements, established for different purposes, and the D.00-03-020 reports are still needed.

### **Standard of Review**

Five parties have tendered an "uncontested settlement" as defined in Rule 51(f), *i.e.*, a settlement that "...is not contested by any party to the proceeding within the comment period after service of the [ ] settlement on all parties to the proceeding." Rule 51.1(e) requires that settlement agreements be reasonable in light of the whole record, consistent with the law, and in the public interest.

This settlement is tendered pursuant to Rule 51, and it is under this standard of review set forth in Rule 51.1(e) that we will evaluate it.

### **Reasonable in Light of the Whole Record**

The settling parties spent considerable time and effort conducting discovery, analyzing complaint records and other documentation, and understanding and explaining the events that led to this proceeding. They prepared and served extensive written testimony and exhibits setting forth and supporting their positions before evidentiary hearings began. That prepared material was admitted into the record by agreement, and it shows all of the parties to have been vigorous and capable participants on behalf of their constituencies. The parties' Joint Statement of the Case (settlement Section 1) provides a summary that reflects the record in this proceeding.

Respondents have acknowledged that the problems consumers experienced, and their failure to report all consumer complaints as the Commission required, were unacceptable and should not have happened.

The settling parties have considered the corrective measures already taken by Respondents to address those problems and have described those measures at length in the settlement agreement. In addition, the settlement agreement prescribes other remedies, such as the billing credits and operational improvements set forth in settlement Sections 2 and 3, to minimize the likelihood of similar problems in the future and to compensate consumers if they do recur. Finally, Respondents have agreed to pay a substantial penalty in consideration of the problems they have acknowledged.

The proposed settlement agreement is based closely on the record the parties have developed, and the remedies it proposes are commensurate with the problems documented. We conclude that it is reasonable in light of the whole record.

#### **Consistent with the Law**

In I.02-01-024, Ordering Paragraphs 1(e) and 1(f), we stated that we would consider whether "Pacific Bell and/or SBC-ASI should be ordered to pay reparations pursuant to ... Code section 734; [and] any or all of the Respondents should be fined pursuant to ... sections 2107 and 2108 for violations of the Public Utilities Code or other order, decision, rule, direction, demand or requirement of the Commission." We address each of these sections here.

In the analysis above, we concluded that some or all of the Respondents have violated Sections 2890(a) and 2890(d)(2)(D), D.00-03-020 as modified by D.00-11-015, and Section 702.

Settlement Section 5 states,

Pursuant to Public Utilities Code sections 2107 and 2108 and the California Public Utilities Commission's Rules of Practice and Procedure Rule 51, Respondents agree to pay \$27,000,000 (twenty-seven million dollars) into the State General Fund

within 30 days after the Commission's approval of this Agreement.

While the settlement itself provides no additional statement of the purpose of this provision, the joint motion does: "Respondents have also agreed to pay a penalty in the amount of \$27,000,000 in acknowledgement of the billing errors that occurred and to ensure future compliance with all applicable laws relating to unauthorized billing." We noted above Respondents' acknowledgement that an estimated 30,000 to 70,000 customers complained about and/or experienced billing errors. The settlement provides no count of the recordkeeping and reporting errors, but their number seems likely to have been small in comparison. The 30,000 to 70,000 figure constitutes customers who "complained about and/or experienced billing errors." We cannot assume that every customer who suffered a billing error actually noticed it or complained, nor can we assume that every complaint represented a true violation. However, even though the absolute number of violations cannot be accurately determined, the 30,000 to 70,000 range the parties have agreed to indicates the *scale* of the problem and is sufficient for our purposes here.

Section 2107 provides for penalties ranging from \$500 to \$20,000 for each offense, and Section 2108 provides that each violation, and each day's continuance of a violation, is a separate offense. The parties have not indicated how they derived the \$27,000,000 total penalty figure, but if Respondents were penalized \$500 for each offense, the total penalty would equate to 54,000 offenses, well within the range indicated. We conclude that the \$27,000,000 penalty the parties propose is consistent with Sections 2107 and 2108.

Section 734 allows the Commission to award reparations where a utility has charged an unreasonable, excessive, or discriminatory amount for a product or service. Settlement Section 1, paragraph 23 states, "Except perhaps



for open complaints, the parties are not aware of any billing complaints that were not ultimately credited or adjusted by Respondents.” The motion echoes that thought as support for the parties’ belief that “Reparations or restitution to consumers are not warranted in this case.” The parties have thus taken into account our I.02-01-024, Ordering Paragraph 1(e) directive to determine the need for reparations pursuant to Section 734, and have recommended that reparations not be ordered. Nothing in the record would lead us to conclude otherwise, so we concur. We note, however, that the settlement does not absolve Respondents of responsibility for reparations on a case-by-case basis where individual customers may in the future present meritorious claims based on Respondents’ past or future wrongful billings, nor would we have approved the settlement on any other basis.

By this decision, we also do not validate the corrective actions identified in paragraphs 45 through 69 and do not make any findings about whether they have been or will be effective in correcting the problems identified. Respondents remain responsible for adopting any and all necessary changes to ensure they are for the future in full compliance with all legal requirements.

The Parties assert that the settlement agreement is consistent with the law. After reviewing the settlement agreement, we agree.

#### **In the Public Interest**

The settling parties aver that the proposed settlement agreement is in the public interest because it protects consumers in many ways, and provides a substantial penalty to ensure future compliance with all applicable laws. We agree. Specifically, we observe that the parties have examined every allegation set forth in our investigatory order and provided their conclusions with respect to each. Where there were problems with Respondents’ operations and practices that harmed consumers, those problems have been exposed and measures taken

to ensure they do not recur. Where there were violations of law, those violations have been acknowledged and an appropriate penalty applied. One of the important advantages any settlement provides is avoiding the time, the expense and the uncertainty of continued litigation. Here, the parties have addressed every issue that led us to open the investigation. Our approval of this settlement will now allow Respondents to implement the corrective measures the settlement outlines, and our staff and the other parties to pursue consumer protection needs in other areas.

For these reasons, we find the proposed settlement to be in the public interest and will approve it.

### **Assignment of Proceeding**

This matter is assigned to Commissioner Wood and ALJ McVicar. ALJ McVicar is the presiding officer for this proceeding.

### **Findings of Fact**

1. Respondents have acknowledged that their customers experienced billing errors in which subscribers' telephone bills contained charges for products or services those subscribers had not authorized.

2. The number of instances of unauthorized billing has not been precisely quantified, but it is substantial.

3. Respondents have acknowledged that they did not always resolve billing errors in a timely manner, and that subscribers had to make multiple calls and substantial investments of time to resolve them.

4. Respondents have acknowledged having inappropriately applied toll restriction for outstanding DSL-related charges, and having sent disconnect notices that might have led customers to believe that their basic service would be disconnected for non-payment of DSL Internet charges or that a security deposit was required.

5. Respondents have acknowledged that Pacific Bell did not always maintain the records and submit accurate reports that D.00-03-020 as modified by D.00-11-015 requires.

6. The problems experienced by consumers caused by Respondents' conduct were unacceptable.

7. The parties are not aware of any billing complaints that were not ultimately credited or adjusted by Respondents, or of any reparations that may be due under Section 734.

8. The proposed settlement agreement is based on the record the parties have developed, and the remedies it proposes are commensurate with the problems they have documented.

9. The settlement presents a reasonable resolution of all of the issues in this proceeding.

10. TURN neither supports nor opposes the settlement.

11. There is no known opposition to the settlement.

### **Conclusions of Law**

1. The proposed settlement proffered by Pacific Bell, PBI, ASI, CSD, and UCAN is an uncontested settlement as defined in Rule 51(f).

2. Some or all Respondents have violated Section 2890(a) by placing on subscribers' bills charges for products or services the purchase of which those subscribers had not authorized.

3. Some or all Respondents have violated Section 2980(d)(2)(D) by failing to provide a means for expeditiously resolving subscriber disputes over charges for a product or service the purchase of which was not authorized by the subscriber.

4. Pacific Bell has violated Ordering Paragraph 2 of D.00-03-020 as modified by D.00-11-015 by failing to maintain records and submit accurate reports as required.

5. Pacific Bell has violated Section 702 by failing to comply with D.00-03-020 as modified by D.00-11-015.

6. The \$27,000,000 penalty Respondents have agreed to pay into the State General Fund under Sections 2107 and 2108 is consistent with the limitations set forth under Section 2107.

7. The settlement is reasonable in light of the whole record, consistent with law, and in the public interest.

8. The settlement should be approved.

9. For administrative efficiency, this order should be made effective today.

## **O R D E R**

### **IT IS ORDERED that:**

1. The Joint Motion of Pacific Bell Telephone Company, Pacific Bell Internet Services, SBC Advanced Solutions, Inc., Utility Consumers' Action Network and the Commission's Consumer Services Division for Approval of Settlement Agreement is granted. The settlement agreement attached to this decision as Appendix A is approved.

2. This proceeding is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

# **APPENDIX A**

Appendix A to C0201007, I0201024 - Settlement Agreement

## Attachment 5

## **SETTLEMENT AGREEMENT**

Pacific Bell Telephone Company ("Pacific Bell"), Pacific Bell Internet Services ("PBI"), SBC Advanced Solutions, Inc. ("ASI"),<sup>1</sup> Utility Consumers' Action Network ("UCAN") and the Consumer Services Division of the California Public Utilities Commission ("CSD") (collectively, the "Parties") hereby agree upon the following terms for the settlement (the "Agreement") of the Commission's Order Instituting Investigation I.02-01-024 ("DSL OIF") and the related complaint of the Utility Consumers' Action Network ("UCAN"), CPUC complaint No. C.02-01-007.

### **TERMS**

#### **1. JOINT STATEMENT OF THE CASE**

UCAN's complaint alleges that customers experienced billing errors. CSD's complaint alleges that it received complaints from customers regarding billing errors, and that Pacific Bell failed to accurately report these complaints. Respondents acknowledge to the Commission that certain billing errors and reporting deficiencies occurred that were unacceptable and should not have happened.

#### ***BACKGROUND***

- 1) In 1998, Pacific Bell began offering on a limited basis Digital Subscriber Line ("DSL") transport to end users for use with a chosen Internet Service Provider ("ISP") and also to ISPs.
- 2) As part of the merger between SBC and Ameritech, the FCC issued an order, in October 1999, containing a set of conditions ("Merger Order and Conditions") which SBC and Ameritech were required to meet in order to obtain FCC approval for the merger.
- 3) Pursuant to the FCC Merger Order and Conditions, Pacific Bell was required to transfer responsibility for DSL transport to an affiliate, ASI.

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<sup>1</sup> Pacific Bell, PBI, and ASI are at times referred to collectively as "Respondents."

- 4) On January 9, 2001, the United States Court of Appeals for the District of Columbia Circuit partially vacated the Merger Order and Conditions, ruling that ASI is a "successor and assign" of its affiliated ILECs for purposes of complying with the ILEC's obligation to make retail Advanced Services, including DSL Transport Services, available to unaffiliated carriers for resale at the Avoided Cost Discount.<sup>2</sup>
- 5) In May 2000, as part of the conversion to ASI (the "conversion"), and the end of Interim Line Sharing as specified in the Merger Order and Conditions, all provisioning and billing responsibilities for DSL transport were transitioned to ASI.
- 6) By the end of 2001, ASI had moved to a completely wholesale model and only billed DSL transport to ISPs.
- 7) ASI, as well as PBI, entered into contracts with Pacific Bell for Billing and Collection services in 1999 and 2000 respectively.
- 8) The SBC-ASI conversion involved the migration of approximately 190,000 to 200,000 customer records from Pacific Bell's systems to ASI's systems.
- 9) ASI was required, in just several months, to replicate the same type of pre-ordering, ordering, provisioning, maintenance and repair, and billing systems Pacific Bell had taken years to develop.

#### ***UNAUTHORIZED CHARGES AND BILLING ERRORS***

- 10) During the period of January 2000 through the present, an estimated 30,000 to 70,000 Respondents' customers complained about and/or experienced billing errors. Certain of these complaints included the following:
  - billing for DSL transport and/or DSL Internet services that were neither ordered nor received;
  - billing for DSL transport and/or DSL Internet services that were ordered but not received;
  - billing for DSL transport and/or DSL Internet services after the consumer requested termination of the service(s);

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<sup>2</sup> On January 18, 2001, the Court of Appeals clarified that "the vacatur applies only insofar as the Order authorizes exemption of advanced services provided through the Order's prescribed affiliate structure from the obligations imposed on incumbent local exchange carriers by 47 U.S.C § 251(c).



- billing by two Respondents for the same DSL transport and/or DSL Internet service;
  - billing for services or products that Respondents promoted as free or as less expensive than the charges placed on the consumers' telephone bills;
  - billing errors were not resolved in a timely manner and/or required multiple calls and substantial investment of time to resolve
- 11) As reflected in the customer complaints, certain customers experienced the following:
- inappropriate charges for early termination fees or failure to inform customers adequately about early termination fees;
  - inappropriate application of toll restriction for outstanding DSL-related charges;
  - DSL service was installed, never worked properly or was cancelled but customers were still charged and could not get recurring monthly charges removed for several months;
  - problems associated with DSL/Compaq computer promotional packages, in many cases, either the DSL and/or the computer never worked, but charges for inoperable service were not timely corrected;
  - customers billed for late payment fees on disputed charges;
  - customers were charged more than advertised price or at different rate than the promotional price quoted for DSL Internet service;
  - inappropriate fees assessed for customer relocation;
  - disconnect notices were sent to customers that might have led them to believe that their basic service would be disconnected for nonpayment of DSL Internet charges or that a security deposit was required;
  - unresponsive service, such as long waiting queues, delays on hold, transfers to other departments, unreturned calls, full voice mail boxes, inability to resolve the problem without having to wait on the phone.

### ***RESPONSIVENESS OF COMPANIES***

- 12) Pacific Bell and PBI became aware of the DSL-related billing problems in early 2000.
- 13) The large majority of the complaints, however, occurred in mid- to late-2000 through 2001.
- 14) In mid-2000, UCAN informed Pacific Bell that UCAN had received an unusually high level of DSL-related complaints.
- 15) On July 9, 2001, CSD informed Pacific Bell and ASI that Consumer Affairs Branch ("CAB") had received thousands of complaints regarding DSL-related service, specifically allegations of unauthorized charges or billing errors for DSL-related service, and requested that Respondents correct the problems immediately.
- 16) In September 2001, representatives from Pacific Bell met with the director of CSD to provide status on DSL complaint trends, including billing complaints.
- 17) Complaints concerning billing problems continued through 2001.
- 18) Throughout 2000 and 2001, the company heavily marketed DSL Internet services.
- 19) As of mid-2002, the number of complaints received by UCAN and CAB have decreased. Because Pacific Bell does not make a record of each consumer DSL-related billing complaint, there is not enough information available to determine the degree to which the complaints have been reduced.
- 20) Respondents acknowledge that numerous customers complained about experiencing a great deal of frustration and inconvenience in trying to correct billing errors.
- 21) Many customers complained about experiencing delays in having their bills corrected, and often were required to place multiple calls to correct their bills.
- 22) Although not required by Commission regulation or decision, Respondents did not record the time it took to respond to customer complaints about DSL-related service charges.
- 23) Except perhaps for open complaints, the parties are not aware of any billing complaints that were not ultimately credited or adjusted by Respondents.

### ***CAUSES OF BILLING ERRORS***

To the extent billing errors occurred:

- 24) Many billing errors were attributable to the extreme complexity of Pacific Bell's billing and customer data management systems and the difficult process of transferring DSL transport functions to ASI.
- 25) These billing errors were compounded by the fact that the billing inquiry function for DSL Internet services was supported by a third-party vendor who did not have access to the back office systems and the customers' service records.
- 26) The third-party vendor had the ability to credit or adjust bills as necessary, but could not search the back office systems or make changes in the back office systems to correct the underlying problem.
- 27) Consequently, even when customers were credited for improper charges, the charges could reappear on subsequent bills because the service had not been removed from their accounts.
- 28) When PBI began to offer a bundled service for DSL transport and Internet service in February 2000, Pacific Bell found that incorrect order entries on certain service orders caused Pacific Bell and later ASI to bill some customers for the DSL transport, under the split billing arrangement, even though PBI billed customers for the bundled DSL Internet service.
- 29) Additionally, upon conversion, Pacific Bell learned that not all accounts were properly transitioned, which resulted in duplicate billing for some customers. As stated, the conversion of the DSL transport customers from Pacific Bell to ASI was a massive undertaking. Although a cross-functional team of process and system experts from Pacific Bell, PBI, and ASI managed the complexity of the transfer, in some cases duplicate billing occurred.

### ***REPORTING***

- 30) CPUC decision D.00-03-020 as modified by D. 00-11-015 (Subscriber Complaint Reporting Rules) sets reporting rules for consumer protection.
- 31) The Subscriber Complaint Reporting Rules require that Pacific Bell maintain accurate and up-to-date records of all customer complaints made to or

received by it for charges for products or services provided by a third party, including corporate affiliates. Pacific Bell is further required to provide the Consumer Services Division a quarterly calendar month summary report showing the following:

- Total number of consumer complaints received each month for each service provider and billing agent;
- Name, address, and telephone number of each entity receiving complaints;
- Total number of subscribers billed for each entity for which the complaints were received; and
- Total dollars billed for each entity for which complaints were received.

32) In the Subscriber Complaint Reporting Rules, Customer Complaint is defined as "any written or oral communication to a Billing Telephone Company or Billing Agent from a person or entity which has been billed for a charge which the person or entity alleges was unauthorized or resulted from false, deceptive, or misleading representations and which was billed, either directly or indirectly, through a Billing Telephone Company."

33) In the Subscriber Complaint Reporting Rules the Commission stated the effect of failure to supply a report of consumer complaints as follows: "Pursuant to §2889.9(f), any billing agent which fails to submit its report in a timely fashion may be the subject of a Commission decision or resolution ordering the billing telephone company to cease providing billing and collections services to that billing agent or service provider, in addition to the Commission's other remedial statutory authority as provided in § 2889.9(b)."

34) On or about June 1, 2000, the relationship between ASI and Pacific Bell became that of Service Provider and Billing Telephone Company respectively. After Pacific Bell transitioned provisioning of DSL transport to ASI, ASI provided billing information to Pacific Bell for subscribers of DSL transport.

35) Pacific Bell provided to CSD quarterly calendar month summary reports of the customer complaints received for the year 2001 and first quarter of 2002.

36) For the year 2001, Pacific Bell initially reported no complaints for PBI or ASI.

- 37) On April 5, 2002, Pacific Bell provided a revised quarterly summary report for the year 2001 showing 30 complaints for PBI and 10 complaints for ASI.
- 38) The Pacific Bell quarterly summary report for the first quarter of 2002 shows 8 complaints for PBI and no complaints for ASI.
- 39) Consumer Affairs Branch has documented 863 DSL unauthorized billing complaints regarding PBI and ASI for January 2001 through April 24, 2002.
- 40) The majority of the unauthorized billing complaints for DSL-related service received by CAB were forwarded to ASI for resolution, and some were forwarded to Pacific Bell.
- 41) In response to Ordering Paragraph 4 the OII, Pacific Bell and ASI provided 11 boxes of complaints to CSD. Review of the boxes by CSD staff reveals evidence of 5,132 complaints received by ASI and Pacific Bell.
- 42) Pacific Bell did not record all consumer DSL-related unauthorized billing complaints it received regarding its affiliates PBI and ASI.
- 43) Although Pacific Bell was under no obligation to report billing complaints received by its affiliates, it was under an obligation to report billing complaints it received for services provided by its affiliates.
- 44) In August 1997, Pacific Bell began tracking *escalated* unauthorized billing complaints for services billed on behalf of its billing and collection customers. In January 1999, Pacific Bell expanded its policy to include *all* such complaints.

#### ***CORRECTIVE ACTIONS***

- 45) While there are reasons and in some cases explanations for the problems that occurred, Respondents recognize their responsibility to aggressively seek to remedy these problems and to prevent such problems from occurring in the future.
- 46) Respondents have undertaken serious efforts to correct the billing errors described herein.
- 47) Pacific Bell created the DSL Internet Billing center. In June 2001, Pacific Bell began the first phase of performing business billing inquiry service for PBI. In April 2002, a new consumer DSL Internet Billing Center was opened

and is staffed with approximately 100 customer representatives who take all PBI billing inquiry calls. The representatives have access to Pacific Bell systems, ASI and PBI systems, which allows them to not only correct the root cause of the problem but also issue a credit if appropriate. This center provides a "one stop shop" where customers who may experience billing issues can get resolution in a timely fashion. These representatives do not sell products and services.

- 48) Pacific Bell, ASI and PBI have undertaken great effort and expense to improve DSL-related service. Billing quality teams are still in place to continually review and upgrade the process.
- 49) Respondents continue to make system enhancements. Specifically, the ordering and billing systems used by respondents are continually being tested, evaluated and updated.
- 50) To ensure that customers were not billed after disconnect, various steps were taken to ensure that PBI receives notification of disconnect orders: CSRs were given further training on the disconnect process; a new process was implemented where the CEPC manually reviews all local service disconnect orders for lines with DSL Internet service in SORD to ensure there is a corresponding disconnect order for the DSL Internet service in ASOS. Additionally, ASI made system upgrades to ASOS to ensure that disconnect orders and telephone number changes would be properly processed.
- 51) Subsequent to the duplicate billing caused by the conversion, a team was assembled to identify and correct the problem and ensure that affected customers were credited.
- 52) To ensure that charges are applied to the correct account, PBI currently researches unbillable charges to ensure they are handled correctly. If a matching telephone number for billing cannot be determined, the account is sent to a Pacific Bell CSR to research and issue a disconnect order if appropriate, so billing would stop.
- 53) To ensure that customers know when their billing will start, PBI implemented a process whereby it (a) sends a postcard to the customer on the day the

service is provisioned telling the customer that billing has begun; (b) if the customer has not registered, a call is made to the customer at 14 days and 21 days after provisioning; and (c) if the customer has not registered, a letter is sent to the customer 35 days after provisioning.

- 54) To avoid misunderstandings about a customer's service order or misunderstandings about charges such as the Early Termination Fee, all new DSL Internet orders are verified with the customers by a manager at the time the order is taken. Pacific Bell instituted service order verification procedures. A Manager verifies all new orders for DSL Internet service with the customer on-line at the time the service order is placed. The manager confirms: PC requirements, due date, promotional terms, whether a technician or self install kit will arrive, Early Termination Fee (if applicable) and notes that the verification has been done in the Billing System or on the service order.
- 55) Pacific Bell expanded its Sales Integrity Process to include DSL-related issues. This ensures that allegations of unauthorized sales are fully investigated and the appropriate action taken. It also ensures that all claims of "service never ordered" are thoroughly investigated and addressed.
- 56) To ensure that only authorized parties place orders for DSL Internet service, PBI upgraded its website with security measures that request additional information from customers placing orders using the on-line tool. The website was upgraded to require the customer to enter their customer code when placing an order. If the customer code is not entered, the order does not flow through and a follow-up verification is necessary for the order to be placed.
- 57) To ensure that customers are not automatically converted to dial-up service when they disconnect their DSL Internet service, service representatives must enter a notation on the disconnect order indicating the customers' desire to maintain their dial up account. Where the CSR does not so note, PBI has a process to zero-rate the dial-up service while a postcard notifies the customer

that dial-up service will be disconnected unless the customer calls by a certain date.

- 58) To avoid billing discrepancies that might result from incorrect service orders, reviews and audits have been instituted for service order quality and are continually conducted to identify training opportunities for CSR development.
- 59) A process has been put in place to ensure that all cancellations are completed. If it were determined that the customer had cancelled the service and was being billed incorrectly, a service order is issued to stop the billing and an adjustment is given.
- 60) Immediately following the ASI conversion, Pacific Bell learned ASI's order system could not process disconnect orders and therefore disconnection notifications were not sent to PBI to stop billing. Consequently, PBI continued to submit its billing for DSL Internet service to Pacific Bell. Additionally, ASI experienced system problems, which caused disconnect orders to process incorrectly so they had to be manually handled. Upgrades to ASI systems corrected these problems.
- 61) Due to the difference in bill rounds between PBI and Pacific Bell, credits, adjustments and changes in billing can take more than one billing cycle to be reflected on the Pacific Bell bill. To avoid customer impacts a pending claim indicator is placed on customer records.
- 62) To prevent incorrect order entries from causing double billing, additional training was provided to the CSRs and a dedicated work team was put in place to reconcile these accounts and to identify and to give credit to affected customers. Pacific Bell also made changes to the systems to ensure that the billing for DSL transport was directed to PBI rather than to the end-user.
- 63) Promotional codes ("promo codes") are manually selected to be placed on the service order by service representatives and are sent to PBI to establish the service type and billing rate for which a customer will be charged. If the wrong promo code is selected, the customer will not be billed the correct amount. Many process and system enhancements have improved this functionality. The list of promo codes has been divided into active and



inactive lists. Now, only active promo codes are readily displayed for use on new service orders. Additional training on the use of proper promo codes was conducted for CSRs and managers, and bi-weekly order audits are conducted to validate performance and identify training leads. Order validation (verification by a manager) was also implemented on all new DSL Internet service requests at the point of sale.

- 64) Pacific Bell instituted service order quality programs. On-going audits and service order reviews are conducted to validate performance and identify training issues.
- 65) Pacific Bell reviews unregistered accounts. As described in PBI testimony customers who do not register on-line for their Internet account are proactively contacted.
- 66) New escalation processes were implemented to ensure that unresolved issues are escalated for resolution.
- 67) Pacific Bell implemented customer satisfaction monitoring. Random monthly customer satisfaction surveys are conducted. The satisfaction rate for DSL Internet service is currently at a mean score of 85.5% YTD. This is consistent with other Pacific Bell products and services for the Sales and Inquiry Team.
- 68) The customer self-install kit has been upgraded. The first upgrade to the kit was in August 2001 when the equipment and the Internet software were combined in the same package. The second upgrade was in March 2002 where a single CD is now provided to download all applicable programs, test the system requirements, and ensure customer registration. The process includes a simpler instruction manual and a single modem for all customers/PC configurations.
- 69) In a good faith effort to further redress these billing errors, Pacific Bell, PBI, and ASI have entered into this Agreement with UCAN and CSD, which among other things institutes several operational changes to improve the billing processes, establishes billing performance remedies should these problems continue to exist, and requires the payment of a fine. These additional measures are set forth below.

## **2. BILLING CREDITS**

- 2.1 Billing Credits. In the event of a Billing Error as described below that occurs after the effective date of this Agreement, Pacific Bell shall cause a credit to be issued to the affected PBI customer for one month of DSL Internet access service, or a \$25 credit toward the customer's telephone account in the event the customer declines to receive or to continue to receive PBI's DSL Internet access service; except, however, failure to correct a billing error pursuant to the terms in category 2.2(6) shall result in a credit of two months of DSL Internet access service, or a \$50 credit toward the customer's telephone account in the event the customer declines to receive or to continue to receive PBI's DSL Internet access service.
- 2.2 Billing Errors. Upon notice by a customer of a Billing Error identified herein, the Billing Credits set forth above shall apply to the following performance failures, for billing services provided by Pacific Bell on behalf of PBI for DSL-related services:
- 2.2(1) Customer does not order PBI's DSL Internet access service but is charged for the service;
  - 2.2(2) Customer orders PBI's DSL Internet access service but the service is not provisioned and the customer is charged for the service (except where failure is unrelated to equipment or service provided by Respondents);
  - 2.2(3) Customer is charged for PBI's DSL Internet access service for more than one billing cycle after the customer terminates the service (except for all applicable charges relating to goods or services provided prior to the termination date).
  - 2.2(4) Customer is double-billed for the same DSL Internet access service (except where the customer caused a second account to be activated);
  - 2.2(5) Customer is charged an incorrect monthly rate or an improper termination or late-payment fee for PBI's DSL Internet access

service as a result of an incorrect promotion code, or is subjected to toll restriction for nonpayment of charges for PBI's DSL Internet access service; and

2.2(6) Customer does not receive a promised billing adjustment or credit, pursuant to subsections 2.2(1)-(5), within ninety days after the initial contact by the customer, where the customer is entitled to an adjustment after investigation (except where the failure to provide the credit within ninety days results from the customer's failure to provide sufficient information).

2.3 Resolving Disputes. In the event of a dispute between the customer and Pacific Bell with respect to the customer's right to receive a Credit under Section 2.2, Pacific Bell agrees the issue may be submitted to the Commission's Expedited Complaint Process for resolution.

2.4 Implementation. The provisions in this Section shall be implemented no later than 60 days after the effective date of this Agreement and approval of the Commission.

2.5 Tracking and Reporting. Pacific Bell shall track and report the total number of customer complaints received each quarter for each of the six categories contained in Section 2 of this Agreement. The report shall contain the amount of credits and/or dollars credited as a result of the reported complaints. The report shall be submitted to the Director of the Commission's Consumer Services Division by the 10th day of the following calendar month of each quarter.

2.6 Sunset Provision. The Billing Remedies set forth in this Section shall sunset two years from the Effective Date of this Agreement.

2.7 Other Governmental Remedies. Nothing herein shall preclude the Commission or any other governmental agency, or any customer receiving a Billing Remedy, from taking enforcement or corrective action for any future conduct giving rise to the payment of such Billing Remedies. The payment of Billing Remedies may be introduced as evidence, however, in

any such proceeding in an effort to obtain an offset or other form of mitigation.

- 2.8 Applicability. Section 2 shall apply to all residential consumers and to small business customers with 20 or less access lines.

### 3. **OPERATIONAL IMPROVEMENTS**

Pacific Bell will institute and maintain the following operational improvements, unless earlier terminated pursuant to a written agreement between the parties, an order from a court or agency of competent jurisdiction, a change of law rendering performance impractical, or a change of circumstances rendering the maintenance of the improvements moot (e.g., events such as a withdrawal of the service offering, discontinuance of billing or inquiry services).

- 3.1 One-Stop Office. Pacific Bell will provide two centers dedicated to handling billing inquiries for PBI's DSL Internet services, one to handle Consumer DSL billing inquiries and one to handle Business DSL billing inquiries.
- 3.2 Improved Reporting. Pacific Bell will ensure that all Customer Service Representatives have been retrained on the current Commission-ordered tracking requirements for billing complaints related to affiliate products.
- 3.3 Generic Disconnection Notices. Pacific Bell is currently working with CPUC telecom staff to improve its disconnection notice as a result of D.02-06-011, which requires Pacific Bell to list DSL Internet services as one of the services for which failure to make payment cannot result in the denial of basic service. The reworking of the notice is being handled through an advice letter process. The Parties will be participating in that process to ensure that the disconnection language notice is understandable and accurate.
- 3.4 Compulsory Service Guidelines. Pacific Bell agrees, in connection with acting as a billing agent for PBI's DSL Internet services, to:

- 3.4(1) send a confirmation letter to customers who order PBI's DSL Internet access service and for whom the charges are to appear on the Pacific Bell bill;
- 3.4(2) not pursue collection action, make adverse credit reports, impose late payment fees, or apply toll restriction for sums due on the Pacific Bell bill for PBI DSL Internet access service charges which are the subject of a bona fide dispute;
- 3.4(3) not impose any DSL-related fees where it is determined that the customer never ordered or received (i.e., not provisioned) PBI DSL Internet service;
- 3.4(4) furnish an e-mail address and P.O. box address to which consumers can correspond regarding PBI DSL Internet access service charges on their Pacific Bell bill;
- 3.4(5) provide a toll-free number that allows access to a Customer Service Representative at the PBI billing inquiry centers on a third prompt for inquiries about PBI DSL Internet access service charges on customers' bills;
- 3.4(6) train and enable Customer Service Representatives at the PBI billing inquiry centers to remove charges, issue credits and order refunds, as appropriate, for PBI DSL Internet access service charges appearing on their Pacific Bell bill;
- 3.4(7) upon customer inquiry regarding a billing dispute, either verify or disprove the customer's authorization of a charge concerning PBI DSL Internet access service charges appearing on their Pacific Bell bill, and communicate the disposition in writing to the customer within 30 days from the date on which the complaint is received; and
- 3.4(8) maintain complaint records pertaining to PBI DSL Internet access service charges billed by Pacific Bell for "active + 3 years" and to respond to Commission requests for the data within 30 days, except where otherwise agreed to with the Commission.

- 3.5 Coupon Rebates. For a period of two years, for DSL-related services, Respondents agree not to use coupon rebates for promotional offerings related to discounts or waivers of monthly rates or installation charges. This provision shall not limit Respondents' right to use coupon rebates for promotional offerings related to customer premises equipment.
- 3.6 Gift/Debit Cards. For a period of two years, DSL-related services, Respondents agree not to use gift/debit cards for promotional offerings as discounts or waivers of monthly rates or installation charges or customer premises equipment, except where the gift/debit card can be used to offset charges for products, services, or equipment on the end user's telephone bill.

**4. PBI BILLING**

For the purposes of this Agreement, PBI warrants that it will not voluntarily terminate its Billing and Collection agreement with Pacific Bell before July 1, 2004. The parties acknowledge that this is not an obligation that could be imposed by the CPUC, and is a voluntary commitment. Nothing in this Agreement shall require PBI to utilize the Billing and Collection service offered by Pacific Bell on an exclusive basis for other forms of payment (e.g, PBI may utilize credit card billing).

**5. PENALTY**

Pursuant to Public Utilities Code sections 2107 and 2108 and the California Public Utilities Commission's Rules of Practice and Procedure Rule 51, Respondents agree to pay \$27,000,000 (twenty-seven million dollars) into the State General Fund within 30 days after the Commission's approval of this Agreement.

**6. DISMISSAL AND SETTLEMENT**

**6.1 Dismissal and Release.**

6.1(1) UCAN, on behalf of itself and all consumers and ratepayers it represents, releases Respondents and their directors, officers, employees, agents, attorneys, shareholders, affiliates, successors, and assigns from all claims and liabilities arising out of the specific Complaint issues. Nothing in this Section, however, shall preclude an action to enforce this Agreement.

6.1(2) UCAN will not pursue claims against Respondents related to the Complaint issues.

6.1(3) All parties support this Agreement as being fair and reasonable in light of the record, consistent with the law, and in the public interest, and all parties agree not to take any action which would undermine this Agreement and the manner in which it has been negotiated.

6.2 Jurisdiction and Enforcement. This Agreement represents a full and final resolution of the DSL OIL, UCAN's Complaint and the matters giving rise thereto. The Commission shall have exclusive jurisdiction over the interpretation and enforcement of this Agreement, and over all matters underlying and giving rise to this Agreement. If the Commission does not approve this Agreement in full, it shall have no force and effect.

6.3 No Waiver. By entering into this Agreement, Pacific Bell, PBI and ASI do not waive their right to contest the extent of the Commission's jurisdiction or authority to impose any requirement of this Agreement in any other proceeding.

6.4 Other Proceedings. The Parties agree that neither the Joint Statement of the Case nor anything contained in this Agreement constitutes a binding

admission or concession in any other proceeding. The parties have entered into this Agreement to effect a compromise and settlement of the contested matters pending before the Commission.

**7. GENERAL TERMS**

- 7.1 Severability. No individual term of this Agreement is assented to by any party except in consideration of the Parties' assent to all other terms. Thus, the Agreement is indivisible and each part is interdependent on each and all other parts. Any party may withdraw from this Agreement if the Commission modifies, deletes from, or adds to the disposition of the matters stipulated herein. The Parties agree, however, to negotiate in good faith with regard to any Commission-ordered changes in order to restore the balance of benefits and burdens, and to exercise the right to withdraw only if such negotiations are unsuccessful.
- 7.2 Successors. This Agreement and all covenants set forth herein shall be binding upon and shall inure to the benefit of the respective Parties hereto, their successors, heirs, assigns, partners, representatives, executors, administrators, parent companies, subsidiary companies, affiliates, divisions, units, agents, attorneys, officers, directors and shareholders.
- 7.3 Knowing and Voluntary Execution. The Parties acknowledge each has read this Agreement, that each fully understands the rights, duties and privileges created hereunder, and that each enters this Agreement freely and voluntarily. Each Party further acknowledges that it has had the opportunity to consult with counsel and discuss the provisions hereof and the consequences of signing this Agreement, and that each Party or their counsel have made such investigation of the facts and law pertaining to the matters herein as they deem necessary, and that they have not relied and do not rely upon any statement, promise or representation by any other party or its counsel, whether oral or written, except as specifically set forth in this Agreement.



- 7.4 Authority to Execute Agreement. The undersigned acknowledge and covenant that they have been duly authorized to execute this Agreement on behalf of their respective principals and that such execution is made within the course and scope of their respective agency or employment.
- 7.5 Entire Agreement. The Parties expressly acknowledge that the consideration recited in this Agreement is the sole and only consideration of this Agreement, and that no representations, promises, or inducements have been made by the Parties or any director, officer, employee, or agent thereof, other than as set forth expressly in this Agreement.
- 7.6 No Waiver or Modification. This Agreement constitutes the entire agreement between the Parties and no terms herein may be waived, modified or amended, except in a writing signed by both Parties.
- 7.7 Choice of Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of California and the rules, regulations and General Orders of the California Public Utilities Commission.
- 7.8 Execution in Counterparts. This Agreement may be executed by any of the Parties in counterparts with the same effect as if all Parties had signed one and the same document. All such counterparts shall be deemed to be an original and shall together constitute one and the same Agreement. A signature transmitted by facsimile shall be regarded as an original signature.

(Signature page to follow)

Dated: 7/3/02

PACIFIC BELL TELEPHONE COMPANY

/s/ Cynthia G. Marshall  
Cynthia G. Marshall  
Pacific Bell Telephone Company  
140 New Montgomery St.  
San Francisco, CA 94105

Dated: \_\_\_\_\_

PACIFIC BELL INTERNET SERVICES,  
INC.

/s/ J. MICHAEL TURNER  
J. Michael Turner  
Pacific Bell Internet Services, Inc.  
1701 Alma Dr.  
Plano, TX 75075

Dated: 7/3/02

SBC ADVANCED SOLUTIONS, INC.

/s/ RICHARD C. DIETZ  
Richard C. Dietz  
SBC Advanced Solutions, Inc.  
300 Convent  
San Antonio, TX 78205

Dated: 7/3/02

UTILITY CONSUMERS' ACTION  
NETWORK

/s/ MICHAEL SHAMES  
Michael Shames  
Utility Consumers' Action Network  
3100 5<sup>th</sup> Avenue, Suite B  
San Diego, CA 92103

Dated: 7/3/02

CONSUMER SERVICES DIVISION

/s/ TRAVIS FOSS  
Travis Foss  
California Public Utilities Commission  
505 Van Ness Avenue  
San Francisco, CA 94102